Summary Report of Tribal Consultation and Engagement Related to the State of Oklahoma's Request to Implement Regulatory Programs in Certain Areas of Indian Country in Accordance with Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA)

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Background

On June 9, 2020, the U.S. Supreme Court decided the case of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In that case, the Supreme Court held that the Creek Nation's Reservation in eastern Oklahoma had not been disestablished by Congress and remained Indian country under federal law. Prior to *McGirt*, the State had, as a practical matter, implemented environmental programs in much of the area that was held by the Supreme Court to be Indian country.

On July 22, 2020, the Governor of the State of Oklahoma requested approval under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users, Pub. Law 109-59, 199 Stat. 1144, 1937 (August 10, 2005) ("SAFETEA"), to administer in certain areas of Indian country the State's environmental regulatory programs that were previously approved by the U.S. Environmental Protection Agency ("EPA") outside of Indian country. The applicable provision of SAFETEA states as follows:

> SEC. 10211. ENVIRONMENTAL PROGRAMS.
>
> (a) OKLAHOMA.—Notwithstanding any other provision of law, if the Administrator of the Environmental Protection Agency (referred to in this section as the ''Administrator'') determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets applicable requirements of the law, and the Administrator approves the State to administer the State program under the law with respect to areas in the State that are not Indian country. Subsequently, upon request of the State, the Administrator shall approve the State to administer the State program in the areas of the State that are in Indian country, without any further demonstration of authority by the State.

Pub. Law 109-59, 199 Stat. 1144, 1937.

Section 10211 of SAFETEA does not define Indian country. Indian country, however, is defined under federal law at 18 U.S.C. § 1151 to mean (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Although this definition is codified in the federal criminal code, it is also relevant for purposes of civil jurisdiction. *See, e.g., DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

Consultation and Engagement

On July 21-22, 2020, EPA provided an update to tribal partners on the *McGirt* decision at the EPA Region 6 Tribal Caucus (July 21) and Regional Tribal Operations Committee (July 22) meetings. On July 24, The Muscogee (Creek) Nation requested tribal consultation on the State of Oklahoma's (State) request to EPA to implement state environmental programs pursuant to authority in Section 10211(a) of SAFETEA in certain areas of Indian country. On August 21, The Muscogee (Creek) Nation sent written comments to EPA. On August 25, EPA held its first consultation meeting with The Muscogee (Creek) Nation honoring that request. On that same day, EPA sent a letter to the thirty-eight federally recognized Oklahoma Tribal Nations inviting consultation on the State's SAFETEA request. On September 1, a consultation update was provided on the Regional Tribal Operations Committee call, with the letter sent to all tribal environmental directors in Region 6. A multi-Tribal Nation consultation was held on September 8, with thirteen Tribal Nations participating. During September 9th -14th, the following individual consultations were held:

- Ottawa Tribe of Oklahoma, September 9; no written comments; verbal comments received on September 9
- The Choctaw Nation of Oklahoma, September 10; written comments received on September 16
- Cherokee Nation, September 11; written comments received on September 8
- The Osage Nation, September 11; no written comments; verbal comments received on September 11
- Sac and Fox Nation, September 11; written comments received on September 4
- Quapaw Nation, September 14; no written comments; verbal comments received on September 14

A second tribal consultation was held with The Muscogee (Creek) Nation on September 10. Pawnee Nation of Oklahoma requested tribal consultation, but a suitable date and time could not be agreed upon before the end of the consultation period.

EPA received additional written comments from the following tribes:

- Absentee-Shawnee Tribe of Indians of Oklahoma, September 25, 2020
- Citizen Potawatomi Nation, September 25, 2020
- Delaware Nation, September 25, 2020
- Fort Sill Apache Tribe of Oklahoma, September 25, 2020
- Iowa Tribe of Oklahoma, September 28, 2020
- Kaw Nation, September 25, 2020
- Pawnee Nation of Oklahoma, September 10, 14, and 23, 2020
- Ponca Tribe of Indians of Oklahoma, September 19, 2020
- Sac and Fox Nation, September 25, 2020
- The Muscogee (Creek) Nation, September 25, 2020

- The Seminole Nation of Oklahoma, September 25, 2020
- Wichita and Affiliated Tribes, September 25, 2020

All Tribal Nations who provided questions and comments, either verbal and/or written, are included in this summary. All consultations were posted in EPA's Tribal Consultation Opportunities Tracking System (TCOTS).

Themes Emerging from Consultation Comment Letters and Meetings

This section highlights comments received as part of the Tribal consultation process, including Tribal consultation comment letters sent to the Agency on the State's request and feedback provided by tribes during leader-to-leader consultation meetings with tribes who requested such engagement. Because tribal consultation commenced prior to the Agency's approval, the themes reflected in tribal consultation comments were based on the information that was available to the tribes at the time.

Key themes that emerged from the tribal meetings and consultation letters are summarized below. The EPA carefully considered all tribal consultation comments, and all comments received during the consultation period.

Tribal Engagement and Consultation

All of the tribes raised questions and comments regarding the consultation process. Comments submitted state that the length of the consultation period was too short, that the consultation should have been extended to tribes beyond Oklahoma, and inquired about the possibility of future consultation if the State was to submit a subsequent request under SAFETEA for areas of Indian country that were excluded in the current request.

Specific tribal comments included the following:

- The EPA cannot satisfy its statutory and policy obligations to the Cherokee Nation by merely engaging in a limited three-week consultation process
- This issue should be presented as a national consultation process. Providing opportunities to engage tribes in all of EPA regions, since the proposed Agency action implicates long-standing EPA Indian Policy and consultation practices that will impact all tribes across the United States.

Response: EPA analyzed and considered the comments submitted regarding the consultation process. Meaningful and timely government-to-government consultation is a key aspect of this partnership and helps ensure that EPA is informed of tribal views and can take tribal input into account in our decisions that affect tribes. Consultation and collaboration with tribes in Region 6, including our tribal partners in Oklahoma, is a bedrock element of our federal/tribal relationships that has been embodied in EPA tribal policies and protocols for decades and is in line with the *EPA Policy on Consultation and Coordination with Indian Tribes* (2011) (Consultation Policy).

EPA consults on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. In this instance, EPA determined that the State of Oklahoma's request to EPA under SAFETEA triggered the Consultation Policy. EPA's action or decision is specific to the State of Oklahoma's request under SAFETEA, and so consultation was offered to tribes located within the state. Each consultation will differ, and the Consultation Policy does not dictate the length of any particular consultation. EPA reviews each action or decision on a case by case basis to determine how to best allow for tribal input. In this instance, considering the prescriptive language of SAFETEA and the desire to provide certainty in a timely manner and with minimal disruption to regulated entities so they are aware of the proper regulatory authority, EPA initiated consultation and reached out to all tribes within Oklahoma and notified them of the opportunity to engage and provide feedback.

EPA is not currently aware of any intent of the State of Oklahoma to amend its current request or make a future request under SAFETEA. If the State were to submit such a request, EPA would undertake a full review to determine whether it complies with the stated requirements of the SAFETEA provision. EPA would determine at that point whether consultation would be appropriate under the Consultation Policy. If EPA were to determine that the action or decision were to affect tribes, EPA would offer consultation per our policy.

1984 Indian Policy

Tribes provided a number of comments regarding how EPA's consideration and approval of the request, and the request from the State of Oklahoma under the SAFETEA provision itself, may be contrary to the principles contained within the *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (1984 Indian Policy). In separate comments, tribes reference the majority of the principles of the 1984 Indian Policy and note that these guiding principles of EPA's Indian Program are not in line with the State's request. For example, comments received note that the 1984 Indian Policy refers to the "Government-to-Government" relationship between EPA and Tribes (Principle #1), that the Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations (Principle #2), and that the Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands (Principle #3). The comments also note that Administrator Wheeler reaffirmed the Policy in April 2019.

Specific tribal comments included the following:

- Would the protection of human health and the environment within a reservation be considered of possible tribal interest to the EPA?
- Considering Principle #4 of the 1984 Indian Policy, does the EPA consider the SAFETEA Midnight Rider as an impediment to working directly with tribal governments in Oklahoma? If not, why not?
- Considering Principle #5 of the 1984 Indian Policy, will the U.S. EPA uphold its promise to Indian Tribes and deny Oklahoma's request to administrator environmental programs

in Indian Country on the basis that approval of the request will affect reservation environments?

Response: The 1984 Indian Policy and the principles contained therein are the base of the EPA Tribal Program and inform EPA's actions and decisions in carrying out our statutory duties in protecting public health and the environment in Indian country. EPA Administrators over the past 30 years have reaffirmed the 1984 Indian Policy, including Administrator Wheeler as pointed out by several of the comments. While EPA continues to be guided by the 1984 Indian Policy, EPA derives its mandates and authorities from federal law, including SAFETEA. Section 10211(a) of SAFETEA imposed express legal obligations on EPA and requires that we act to approve a request that meets the basic elements of the statute, when the State of Oklahoma seeks to implement its approved environmental programs in areas of Indian country within the State. EPA will act upon the request in a manner that is in compliance with federal law and is protective of human health and the environment. EPA recognizes the importance of the 1984 Indian Policy to tribes within Oklahoma and will continue to rely upon its principles in implementing our legal and statutory duties, including implementing our authorities in Oklahoma resulting from EPA's decision on the state's request under SAFETEA.

Federal Trust Responsibility

Tribes expressed concern that the State's request to assume jurisdiction is unprecedented and will substantially impact the tribe's ability to exercise self-governance in protecting human health and the environment on reservation lands in Oklahoma.

Specific Tribal comments included the following:

- When considering the state's request, the Agency must adhere to long- standing EPA Indian policy requirements and federal trust obligation owed to tribal nations in accordance with treaties and federal law.

Response: EPA appreciates the important tribal interests in environmental protection throughout their reservations. EPA recognizes and honors the general trust responsibility that the federal government has toward all federally recognized tribes, which is a key component of the unique relationship between the federal government and tribes. For EPA, the trust responsibility informs how we exercise our discretion, when it is legally available, to protect tribal health and environments. Consistent with this responsibility, EPA consults with tribes and considers their views and interests when taking actions that may affect them or their resources. In this instance, although the general trust responsibility does not alter the basic mandatory requirement in section 10211(a) of SAFETEA that EPA approve Oklahoma's request, EPA consulted with tribes in accordance with EPA's Consultation Policy and considered comments received while reviewing Oklahoma's request to EPA under the SAFETEA provision.

Treaties

Several tribes expressed concern about potential conflicts between Section 10211 of SAFETEA and certain guarantees made in treaties with Tribal Nations in Oklahoma. Tribes emphasized that treaties are the "supreme law of the land" and that treaty rights should be considered in determining whether the State may exercise jurisdiction under SAFETEA given these guarantees.

Specific tribal comments included the following:

- Tribes pointed to specific language in the following treaties: Article 4, Treaty of Dancing Rabbit Creek 1830 (Choctaw); Article 7, Treaty of 1866 (Choctaw and Chickasaw); Treaty of New Echota (1835); Treaty of 1833 (Creek); and Treaty of 1856 (Creek)
- One tribe also provided information to EPA regarding opinions of another federal agency, the National Labor Relations Board, that recently addressed specific treaty provisions.
- Several tribes pointed to the U.S. Constitution, specifically Article VI which declares that treaties are the supreme law of the land.
- Several tribes asked how EPA interprets language in treaties, specifically limiting the State's ability to assume jurisdiction over the reservation.
- One tribe asked how EPA will fulfill its duties to honor and respect tribal treaty rights and resources protected by treaties.

Response: EPA understands that many Tribal Nations, including many tribes in Oklahoma, entered into treaties with the United States in the nineteenth century. EPA is very mindful of the critical importance of these treaties and that the U.S. Constitution establishes that treaties are part of the supreme law of the land, with the same legal force as federal statutes. Consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights*, EPA seeks tribal views and any relevant information regarding the rights reserved by tribes in treaties. EPA considers all relevant information provided by tribes to help ensure that we are fully informed regarding these rights as we take actions to implement our programs.

EPA recognizes that typically, states do not have jurisdiction in Indian country to implement regulatory programs under the federal environmental laws administered by EPA. *See, e.g., Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). In some cases, this basic principle of federal law may also be reflected in treaties with Indian Tribes, that may address limitations on, or exclusions of, state jurisdiction over tribes or areas of Indian country. However, where a federal statute expressly provides for state program administration in Indian country, EPA is bound to apply that law and approve a proper request for such state administration.

Importantly, Congress has plenary power to manage affairs with Indian Tribes, and it is well settled that clear and explicit provisions of law enacted by Congress in the exercise of its Constitutional power are controlling, even in the face of conflict with an earlier treaty. *See, e.g., U.S. v. Dion, 476 U.S. 734, 738 (1986); Lone Wolf v Hitchcock*, 187 U.S. 553 (1903). Congress

thus has power to abrogate a treaty with Indians, or any provision of such a treaty, by legislation, but must make its intention to do so clear and plain. Dion, 476 U.S. at 738; *see also*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).
EPA recognizes that treaties, including the treaties referenced by the tribes in Oklahoma, are Constitutionally recognized as the "supreme law of the land" with the same legal effect as a federal statute. However, EPA is also bound to apply the clear and express mandate of Section 10211(a) of SAFETEA, a duly enacted Act of Congress, that specifically allows environmental regulation under EPA administered statutes by the State in areas of Indian country, and that requires EPA to approve a request of the State to so regulate notwithstanding any other provision of law and without any further demonstration of authority by the State. Because Congress may provide for such regulation, even in contravention of prior treaty provisions, EPA must follow the requirements of Section 10211(a) notwithstanding any general treaty rights that may appear to conflict with the specific mandate in Section 10211(a).

One tribe referenced an opinion of the National Labor Relations Board that interpreted a provision of the tribe's 1835 Treaty that secured "the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Nation]; . . . the U.S. shall forever secure said [Nation] from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs." *Chickasaw Nation*, 362 NLRB 942, 943 (2015). That case involved application of the National Labor Relations Act, a statute of general applicability that would typically not apply to an Indian Tribe in the face of a conflict with preexisting treaty rights. Section 10211(a) of SAFETEA is not a law of general applicability. Rather, it specifically addresses environmental regulatory programs under statutes administered by EPA in Oklahoma and mandates that EPA approve a request of the State to administer its approved environmental programs in areas of Indian country, notwithstanding any other provision of law and without any further demonstration of authority by the State.

Process

Several tribes inquired about what process EPA would use to review and approve the State's request.

Specific tribal comments included the following:

- One asked EPA whether EPA would publish notice, would provide or are required to provide notice and comment and if so, when all of this would occur.
- Several tribes asked about EPA's timeline for approval.
- One tribe asked about administrative appeal rights.
- One tribe asked whether EPA would prepare NEPA analysis.
- One tribe asked whether EPA would comply with the National Historic Preservation Act or the Endangered Species Act.

- Several tribes asked what factors EPA would use in determining whether to approve or deny the state's request.
- One tribe asked for contact information of EPA employees involved in the consultations and approvals.

Response: Section 10211(a) of SAFETEA does not specify a process or timeline for processing a request from the State, or appeal rights in connection with any EPA decision. It simply mandates that EPA approve the State's request, so long as the basic elements of the statute are present – *i.e.*, that the request relates to a regulatory program submitted by the state for approval by EPA under a law administered by EPA that EPA has determined meets applicable requirements of the law and has approved to apply outside of Indian country. The provision also mandates that EPA approve the state's request notwithstanding any other provision of law and without any further demonstration of authority. Although section 10211(a) includes no procedural requirements to govern EPA's mandatory decision, consistent with longstanding Agency policy, EPA invited Indian tribes located in Oklahoma to consult with the Agency and to provide their views regarding the state's request.

NEPA requires a reasonably close causal relationship between a federal action and reasonably foreseeable environmental impacts. In addition, NEPA does not apply to actions where an agency lack authority to consider environmental impacts. Because SAFETEA mandates that EPA approve the State's request to implement approved programs, NEPA does not apply. For similar reasons, compliance with the NHPA and ESA are also not required. (See *e.g.*, *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 127 (2007).

Scope of approval/implementation

Many tribes expressed concern about the impact of an invocation of SAFETEA. Concerns related to the geographic and regulatory scope of the State's request and implementation once the State's request is approved.

Specific tribal comments included the following:

- Whether and how the geographic scope of the State's programs would expand after approval or whether the scope would remain the same as before the *McGirt* decision.
- What is the regulatory scope of the State's current programs, whether that would remain the same as before the *McGirt* decision, and whether they would receive documentation describing the scope of Oklahoma's authority.
- EPA should state clearly that approval of the State's request would not limit a tribe's authority over trust lands, allotments, and treaty fee lands.
- Whether approval would affect fee-to-trust applications.
- The State would be required to consult with tribes on environmental decisions or whether EPA would put forth a plan to allow tribes to participate in environmental regulatory activity.

Response: Generally speaking, following approval of the State's request, the geographic and programmatic scope of Oklahoma's regulatory programs will not change from that which existed, as a practical matter, prior to the *McGirt* decision. The programmatic and geographic scope of the State's programs, and what is approved, is addressed in more detail – including any disparities from the practical situation pre-*McGirt* – in the State's request and EPA's approval.

In addition, EPA's approval is not intended to affect any authority that a tribe or EPA may have on Tribal Trust lands, allotments, or treaty fee lands. Nor is EPA's approval intended to address any aspect of any tribe's authority based on tribal law outside the scope of any statute administered by EPA. EPA's decision under SAFETEA will generally not affect EPA's direct implementation of programs on trust lands, allotments, and treaty fee lands.

The State's request is limited to environmental regulatory programs under statutes administered by EPA. EPA does not expect that fee-to-trust applications will be affected by EPA's decision. Finally, EPA's statutes and section 10211(a) of SAFETEA do not provide EPA with authority to require a state to comply with EPA consultation policy or mandate that a state be required to consult with tribes as a condition of program assumption. EPA encourages tribal governments to engage with the State on any matters in which they have interests.

Program Specific Questions

Many tribes raised specific questions regarding the impact of the invocation of SAFETEA on certain environmental programs.

Specific Tribal comments included the following:

- Whether the State of Oklahoma will have authority pursuant the CAA National Emission Standards for Hazardous Air Pollutants (NESHAP) delegation over allotted lands.
- Whether the State's request affect the Superfund MOU for Tar Creek or work with Tribal partners at the site.
- Whether the State's SAFETEA request affect the regulation of the different classes of wells in Osage County.
- Whether the State's request affects a tribe's ability to obtain EPA inspector credentials and whether the State programs and inspections "rank higher" than federal credentials.

Response:

EPA's current NESHAP delegation to Oklahoma to implement and enforce certain NESHAP does not extend to sources or activities located in Indian country, as defined in 18 U.S.C. § 1151, including allotments. *See* 83 FR 53183 (Oct. 22, 2018). In addition, Oklahoma's July 22, 2020, request does not seek EPA's approval to administer any programs in Indian country on lands, including rights-of-way running through the same, that qualify as Indian allotments, the Indian titles to which have not been extinguished, under 18 U.S.C. § 1151(c).

The current SAFETEA request should not have any effect on EPA's Tar Creek cooperative agreement with the Quapaw. The Quapaw cooperative agreement for remedial work is between EPA and the Quapaw and administered by EPA. In addition, the current request should not have any effect on the Tar Creek work with tribal partners. Region 6 is committed to working with our state and tribal partners to respond to the Tar Creek site.

The State has expressly excluded from its request the Class II Underground Injection Control program within Osage County, which EPA has historically implemented along with the Osage Nation. EPA will continue to directly implement that program within Osage Country. However, because the State's request only excludes Class II, the State would be the appropriate regulatory agency for all other classes of wells within Osage County. This will be a change in regulatory authority from pre-*McGirt* practices.

The partnership between the EPA and Osage Nation for the Class II program will not be affected nor will the Osage Nation Department of Natural Resources' work towards obtaining EPA inspector credentials. All EPA environmental inspector credentials, whether for state or tribal employees, are issued by EPA using the same criteria and process.

State Programs/Oversight

Many tribes expressed concern about the manner in which EPA will ensure that the State of Oklahoma implements the environmental programs appropriately. Some concerns focused on actions that may be taken by EPA prior to the approval of the State's request under SAFETEA, while others focused on post-approval.

Specific tribal comments included the following:

- Dates of approvals of environmental programs listed by the State.
- Whether, how, and how often state approved programs are monitored by EPA.
- Whether EPA can make available to tribes completed reviews showing how each program performed in the eyes of the EPA
- Whether there are any circumstances where EPA could revoke a state's program delegations or authorizations.
- Whether a tribe could request additional consultation prior to approving the state to administer the programs in Indian county after review of the program evaluations.

Response: As the federal programs are revised and updated by EPA, states are required to update their programs as necessary to be consistent with the federal programs and submit those to EPA for approval. As a result, the approval dates of the environmental programs vary greatly. EPA's method of oversight of a state's implementation of each program is unique to the individual program. Nevertheless, the general approach is the same: periodic reviews and technical assistance is provided to the state, as needed. For many of these programs, when EPA determines that failures or deficiencies exist in a state's implementation of a program, EPA may withdraw the authorization for the State to administer the program or impose other sanctions. For the permitting program under Title V of the Clean Air Act and state

implementation plans under section 110 of Clean Air Act, states have the opportunity to correct identified deficiencies. If those deficiencies are not corrected in a timely manner, various sanctions may be implemented. EPA Region 6 will make available to tribes records related to the reviews and oversight of Oklahoma state programs upon request. EPA is unable to grant any additional consultation prior to a final decision on Oklahoma's request.

The following is a brief discussion of EPA's oversight authorities under the larger programs:

- Clean Water Act, NPDES Permitting Programs: EPA uses the Permit Quality Review (PQR) process to assess whether NPDES permits meet the applicable requirements in the Clean Water Act (CWA) and environmental regulations. During each PQR, EPA reviews a sample of states' NPDES permits to reflect a cross section of a state's permitting authority. EPA Headquarters will also review permits issued by EPA regional offices for states without NPDES authorization and other areas where EPA regional offices issue NPDES permits. These reviews evaluate the following: permit language, fact sheets (documents explaining the rationale for permit conditions), calculations, supporting documents in the administrative record, and state permitting program initiatives. Through this review mechanism, EPA promotes national consistency and identifies successes and opportunities to improve NPDES permit programs. EPA Region 6 performed the last PQR on Oklahoma's program in August 2020 with no deficiencies noted.
- Safe Drinking Water Act, Underground Injection Control (UIC) and Drinking Water programs: EPA conducts quarterly conference calls with the state agency and conducts on on-site end of year review at the state offices. Further oversight of the drinking water program is achieved through a program review every five years (which looks at the accuracy of compliance determinations by a thorough review of the information in the Safe Drinking Water Information System).
- Resource Conservation and Recovery Act Programs: EPA conducts an annual review of the states' accomplishments under programs that EPA funds under the RCRA State and Tribal Assistance (STAG) grants (Subtitle C). That includes authorization, permitting, corrective action, inspections, and enforcement activities. EPA provides technical assistance to the states on solid waste (Subtitle D), but does not conduct regular oversight because EPA does not provide them with funds to run their Subtitle D programs; however, EPA does follow up with the states if EPA receives a complaint.
- Clean Air Act Programs: In connection with a state's Clean Air Act Title V permitting program, EPA has oversight authority pursuant to 40 CFR 70.10(b). ODEQ's title V program is evaluated every 5 years. The last evaluation EPA performed was in 2018 with the final report being released on June 20, 2019. In addition, ODEQ is required to send all proposed title V permits to EPA for a 45-day opportunity to review pursuant to 40 CFR 70.8 for initial title V permits and significant modifications. Also, EPA has the ability to reopen title V permits for cause, object to title V permits, and to address title V petitions from the public pursuant to 40 CFR 70.8. While EPA does not necessarily review all title V permits, it typically reviews those which receive significant public comments and/or those that appear to have significant public interest. With respect to other forms of Clean Air Act permitting, EPA's PPG grant

agreement/workplan requires, for example, that ODEQ send to EPA all draft PSD permits they are proposing for public comment. EPA reviews those permits periodically to ensure that ODEQ is implementing their approved SIP consistent with the rules. In our grant agreement, ODEQ has also committed to send EPA any minor NSR permits if EPA specifically requests a draft permit. Typically, this would occur if there is significant public interest in a prospective permit.

Tribal Program Development

Several tribes asked about the effect that the EPA approval of the State of Oklahoma's request might have on their environmental capacity building efforts.

Specific tribal comments included the following:

- One tribe was concerned about the effect on the GAP program.
- Another tribe wanted to know about building equity in environmental concerns without being constrained by the State of Oklahoma.
- Other tribes were concerned about adverse effects on Treatment as a State (TAS) authorities if granted to the tribes.

Response: The Indian Environmental General Assistance Program (GAP) is a separate authority and is not part of the scope of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA). EPA intends to continue to provide GAP grants to federally recognized tribes and tribal consortia in Oklahoma for planning, developing and establishing environmental protection programs in Indian country, and to develop and implement solid and hazardous waste programs in accordance with individual tribal needs and applicable federal laws and regulations. Additionally, TAS authority is addressed in a different provision of SAFETEA and falls out of the scope of the State of Oklahoma's request, and implementation of that provision remains unchanged.

SAFETEA

Many tribes expressed concerns and asked questions about the implications and validity of section 10211.

Specific tribal comments included the following:

- One tribe asked about the legal status of section 10211.
- One tribe asked about effects of repeal of section 10211.
- One tribe asked about how section 10211, which is related to the state's ability to administer environmental programs, is connected to a transportation bill.
- A couple of tribes inquired about the effect of this approval on section 10211(b) of SAFETEA and its requirement for cooperative agreements.

Response: In 2005, Section 10211 was added to the "Miscellaneous" chapter of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA), a transportation appropriations bill. The Chapter in which it was placed deals with many topics,

some of which are not related to transportation projects. EPA has found no evidence, nor has any been provided by tribes, that indicates section 10211 has sunset and is therefore no longer valid. Should Congress elect to repeal this provision after EPA approves the State's request, EPA would address any effect on its approval of the State's request at that time.

Section 10211(b), and the cooperative agreements that are required under that subsection, are not implicated by the State's request and therefore outside of the scope of this approval. Nevertheless, EPA recognizes that this requirement is of concern to the tribal nations of Oklahoma. As mentioned above, because there is no evidence that the provision has sunset or is otherwise invalid, the requirement of Section 10211(b) for a cooperative agreement remains a prerequisite for tribal assumption of regulatory programs. This requirement does not apply to non-regulatory grant programs. To date, EPA has approved only one cooperative agreement under this provision: between the Citizen Potawatomi Nation and the State. However, upon the Citizen Potawatomi Nation's subsequent application for Treatment in a Manner Similar to a State (TAS) for the Clean Water Act Section 303(c) Water Quality Standards Program, the State opted not to renew the cooperative agreement with the tribe, which terminated the agreement and the ability of the EPA to approve the tribe for TAS eligibility to administer the Standards program.